

**Teoh Hooi Leong v Bar Council,
Malaysia**SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO
02-19-90HASHIM YEOP A SANI CJ (MALAYA), HARUN HASHIM AND
MOHAMED YUSOFF SCJJ

27 MARCH 1991

*Legal Profession — Restoration of name to roll of advocates and
solicitors — Principles to be applied in considering application —
Service of motion — Legal Profession Act 1976, s 107*

This was an appeal by the appellant against the decision of the High Court refusing his application under s 107 of the Legal Profession Act 1976, to have his name restored to the roll of advocates and solicitors of the High Court, Malaya. The appellant had been convicted of criminal breach of trust and on his plea of guilty had been sentenced to three months' imprisonment and a fine of \$2,000. He served the sentence and paid the fine. He was also made a bankrupt but had subsequently obtained a discharge from bankruptcy. He had applied on his own initiative to have his name removed from the roll. Later, he applied to have his name restored to the roll of advocates and solicitors. The Bar Council informed him that it would not object to the application. The High Court refused the application on the ground that the appellant had not discharged the onus that he was a fit and proper person and that he had not shown exceptional circumstances. The appellant appealed.

Held, allowing the appeal:

(1) Under s 107(1) of the Legal Profession Act 1976, the High Court may, if it thinks it fair and reasonable, order the registrar to restore the name of any advocate and solicitor which has been removed or struck off the roll. The word 'fair' must necessarily mean that the decision must be fair to members of the public, to the court and last but not least to the advocate and solicitor concerned. To be reasonable the decision must be based on reasonable grounds and be supported by cogent evidence and not one based on conjecture or speculation.

(2) A conviction should not be regarded in every case as a permanent unfitness. Disbarment is not necessarily intended to be permanent but that a heavy burden lay upon an applicant to show that he is now a fit and proper person to have his name restored to the roll. The lapse of time since the conviction is thus a material consideration. It is true that there should be strong disinclination to re-admit to the profession an advocate and solicitor who had been guilty of improper conduct. The principle that once a solicitor has been struck off the roll for dishonesty he cannot be restored unless there are exceptional circumstances should no longer apply in absolute terms. If an advocate and solicitor lives a blameless life and there is evidence that he has rehabilitated himself generally and there are members of the profession who can vouch to this change, that may overcome the initial misconduct.

(3) The duty of the court in a case like this is to exercise its discretion having regard to the materials available before it and the particular facts of the case. The question should be seen as an exercise of discretion according to particular facts of the case. It should never be regarded as a principle laid down as a rule of law that an advocate and solicitor who has been struck off the roll for dishonesty can never be reinstated.

(4) The question in this case is whether on the materials available it is fair and reasonable for the court to find that the

A appellant is a proper person to have his name restored to the roll and it is not against the public interest to so order. Considering all the circumstances of the case, it was certainly fair and reasonable to allow the appellant's name to be restored to the roll.

[Bahasa Malaysia summary]

Ini adalah rayuan yang dibuat terhadap keputusan Mahkamah

B Tinggi yang telah menolak permohonan perayu di bawah s 107 Akta Profesyen Guaman 1976, supaya namanya dimasukkan semula di dalam daftar peguambela dan peguamcara, Mahkamah Tinggi, Malaya. Perayu telah disabitkan dengan kesalahan pecah amanah jenayah dan atas pengakuan salahnya telah dihukum tiga bulan penjara dan denda \$2,000. Ia telah menjalani hukuman itu dan telah membayar denda itu. Ia juga telah dijadikan bankrap akan tetapi kemudiannya telah dilepaskan dari kebangkrutan itu. Ia sendiri telah memohon namanya dikeluarkan dari daftar peguambela dan peguamcara. Ia kemudiannya memohon supaya namanya dimasukkan balek ke daftar itu. Majlis Peguam telah memberitahunya bahawa Majlis itu tidak akan membuat apa-apa bantahan kepada permohonan itu. Mahkamah Tinggi telah menolak permohonannya atas alasan ia telah tidak berjaya membuktikan bahawa ialah seorang yang layak dan sesuai dan ia tidak menunjukkan ada keadaan istimewa di dalam kesnya. Ia telah merayu.

Diputuskan, membenarkan rayuan itu:

(1) Di bawah s 107(1) Akta Profesyen Guaman 1976 Mahkamah Tinggi boleh, jika ia berpendapat adalah wajar dan munasabah membuat demikian, memerintahkan pendafatar memasukkan balik nama peguambela dan peguamcara yang telah dikeluarkan atau dibuang dari daftar. Perkataan 'wajar' hendaklah membawa pengertian bahawa keputusan itu hendaklah wajar terhadap orang-orang awam, kepada mahkamah dan juga kepada peguambela dan peguamcara yang berkenaan. Supaya keputusan boleh dikatakan munasabah ia hendaklah berdasar kepada alasan-alasan yang munasabah dan disokong oleh keterangan yang boleh dipercayai dan bukan hanya bergantung kepada dugaan atau sangkaan.

F (2) Sabitan atas kesalahan tidak seharusnya dianggap sebagai kecacatan kekal. Pengeluaran dari daftar tidak semestinya untuk selama-lama akan tetapi memanglah beban yang berat yang dipikul oleh pemohon untuk menunjukkan bahawa ia sekarang adalah orang yang layak dan wajar untuk dimasukkan balik namanya di dalam daftar. Jangka waktu sekian lama selepas sabitan itu adalah perkara yang harus diberi pertimbangan. Memang benar terdapat keengganan yang kuat menerima balik kepada profesyennya seorang peguambela dan peguamcara yang telah bersalah kerana berkelakuan sumbang. Prinsip bahawa seorang peguam yang telah dikeluarkan dari daftar atas sebab penipuan tidak boleh diterima balik kecuali jika terdapat keadaan yang istimewa tidak lagi harus dikenakan secara mutlak. Jika seorang peguambela dan peguamcara telah hidup dengan baik dan tidak melakukan kesalahan dan ada bukti menunjukkan ia telah memulihkan dirinya dan terdapat pengamal profesyennya yang sedia menjamin kebajikannya boleh menebus kesalahannya dahulu itu.

(3) Tugas mahkamah di dalam kes seperti ini ialah menjalankan budibicaranya dengan mengambil perhatian perkara-perkara yang dikemukakan dihadapannya dan fakta tertentu kes itu. Soalan itu hendaklah dianggap sebagai menjalankan budibicara di dalam fakta tertentu kes itu. Tidaklah boleh dipandang sebagai prinsip yang diperuntukkan sebagai undang-undang bahawa seorang peguambela dan peguamcara yang telah dikeluarkan namanya dari daftar tidak boleh diterima masuk balik.

(4) Soalnya di dalam kes ini ialah sama ada atas perkara-perkara yang terdapat adakah wajar dan munasabah bagi mahkamah berpendapat bahawa perayu adalah orang yang layak mendapat namanya dimasukkan balik di dalam daftar dan tidaklah bertentangan dengan kepentingan awam diperintahkan sedemikian. Dengan memberi perhatian kepada semua keadaan kes ini, memanglah wajar dan munasabah membenarkan nama perayu dimasukkan balik di dalam daftar.]

Cases referred to

- 1 *Chan Chow Wang v Malaysian Bar* [1986] 2 MLJ 159 (fold)
- 2 *Re Chin Swee Oon* [1964] MLJ 124 (fold)
- 3 *Re Lim Cheng Peng* [1988] 1 MLJ 231 (fold)
- 4 *Ex parte Lenehan* (1948) 77 CLR 403 (fold)
- 5 *Ex parte FE Maddocks Cohen* (1956) 73 WN (NSW) 126 (fold)
- 6 *Ex parte Clyne* (1962) SR (NSW) 436 (refd)
- 7 *Coghan v Cumberland* [1898] 1 Ch D 704 (fold)

Appeal from: Originating Motion No 17-40-89 (High Court, Kuala Lumpur)

RR Sethu (Christina Chia with him) for the appellant.
Bharti Seth (Maidzura Mohamed with her) for the respondent.

Cur Adv Vult

Hashim Yeop A Sani CJ (Malaya) (delivering the judgment of the court): This was an appeal by Teoh Hooi Leong, an applicant under s 107 of the Legal Profession Act 1976 ('the Act') against the decision of the High Court refusing his application to have his name restored to the Roll of Advocates and Solicitors of the High Court, Malaya.

Under s 107 of the Act, the High Court, consisting of three judges, may if it thinks fair and reasonable so to do, restore to the roll the name of the advocate and solicitor which had been removed from or struck off the roll. Any party aggrieved by the decision of the High Court under this section has a right of appeal to this court.

The appellant was conferred the Degree of Bachelor of Laws (Hons) by the University of Singapore in 1966. He was admitted as an advocate and solicitor of the High Court Malaya on 27 June 1967 and was practising until October 1974. In 1974 he was charged with two counts of criminal breach of trust of \$99,240 under s 409 of the Penal Code. He pleaded guilty to the charges and was sentenced to 18 months' imprisonment. However, on appeal, the sentence was reduced to three months' imprisonment and a fine of \$2,000. He served the sentence and paid the fine.

In 1975 he was made a bankrupt. Also in 1975 he applied on his own initiative to have his name removed from the roll. However, due to some miscommunication, the appellant's name remained in the roll until 1989. From 1974 to 1987 the appellant did not practice

A but was employed by various companies assisting in legal advice but not in any managerial capacity. On 10 May 1989 the appellant gave notice to the Bar Council of his intention to make an application to be restored to the roll. The Bar Council wrote to him on 14 June 1989 to state that it would not object to the application.

B Section 107(1) of the Act states as follows:

The High Court may, if it thinks *fair and reasonable*, at any time order the Registrar to restore to the Roll the name of an advocate and solicitor which has been removed from, or struck off, the Roll.

C The High Court's refusal to allow the application of the appellant was grounded basically on what appeared to be its view that the appellant had not discharged the onus that he was a 'fit and proper person' and that he had not shown exceptional circumstances. The reasoning of the High Court is as expressed in paras 29, 30 and 39 of the judgment following immediately after its observations on the increasing number of allegations of fraud against lawyers in this country:

29 To be called to the Bar one has to be 'a fit and proper person.' This is not just a cliché, and persons of standing who give such testimonials to aspirants to the profession would do well to make a very careful evaluation of the characters they are assisting to let loose on the Malaysian public.

30 Where a solicitor has abused his trust by committing fraud in misappropriating client's moneys we consider that disbarment must follow as a matter of course. Such a person can only be reinstated to the Roll in the most exceptional circumstances.

...

39 In conclusion we must emphasize that the legal profession should be perceived to be an honourable one. So where a solicitor has been disbarred for dishonourable conduct it is only in the most exceptional cases that he can be restored to the Roll. The onus on him to show he is now a fit and proper person is a very heavy one.

G Among its findings, material in the process of assessment by the High Court would seem to be its finding that although the appellant was earning a substantial salary at all material times from the various companies he had failed to make a proper restitution to his creditors over the years. Also material was its finding that the total sum misappropriated by the appellant was \$138,791 when in fact misappropriation related only to the sum of \$99,240 out of the total disclosed liability of \$450,957.10.

H The appellant's debts were mostly unsecured gambling debts from individuals. Of this only a sum of \$153,812.92 was proved in bankruptcy. Notices of intended dividend were sent to 15 unproved creditors amounting to \$286,586.90 but all the notices were returned undelivered. On 13 June 1988 the appellant obtained an order of discharge from bankruptcy.

What are the principles to be applied by the court in considering an application under s 107 of the Act?

It is a matter of public policy that a heavy burden should be imposed on an applicant under s 107 of the Act to satisfy the court that he is a fit and proper person to have his name restored to the Roll. This high standard required was observed and applied in *Chan Chow Wang v Malaysian Bar*¹ which is also an application under s 107 of the Act. In that case the court applied *Re Chin Swee Oon*² for the principle that each case has to be decided on its own facts and decided that despite the objection from the Bar Council, 'it was fair and reasonable' to allow the name of the applicant to be restored to the Roll.

The corresponding Singapore law provides that 'the court may, if it thinks fit' restore the name of a solicitor (s 99 of the Singapore Legal Profession Act (Cap 161, 1990 Ed)). In both jurisdictions an exercise of discretion is involved.

In *Re Lim Cheng Peng*³ the applicant was also convicted under s 409 of the Penal Code whereupon he was struck off the roll in 1984. In 1987 he took out an originating motion to have his name restored. Wee Chong Jin CJ tabulated three matters connected with the discretion under the Singapore section, namely:

- (1) the court may order restoration if it thinks fit; the discretion is conferred by the legislature which must of course be exercised judicially;
- (2) there is no stipulation as to the period of time that must lapse between the date of the order striking the solicitor off the roll and the date of his application for restoration to the roll; and
- (3) the court must consider the views of the Council of the Law Society of Singapore.

It is clear in the judgment of the Singapore case (at p 233) that the lapse of time between the date of the order striking off the name of the applicant and the date of the application for restoration is a relevant consideration:

We are of the view that unless there are exceptional circumstances, we would say that, as a general rule, no solicitor who has been struck off the roll ought to contemplate taking out an application under s 99 of the Legal Profession Act before the expiration of five years from the date of the order of striking off.

In that case the Singapore court however emphasized that the case turned entirely on its own special facts and in the light of all the circumstances the court thought it fit though not without some hesitation, that the name of the applicant should be restored to the roll. In the instant case the High Court applied the exceptional circumstances test and held that the appellant had failed to discharge the onus. This is clearly shown in the paragraph reproduced earlier in the judgment.

A We are of the view that it is erroneous to apply the exceptional circumstances test as an absolute test. We accept that there is an onus on the applicant under s 107 of the Act to satisfy the court that he is a fit and proper person to have his name restored to the Roll. But the operative words in law are 'fair and reasonable', as also observed by Harun J (as he then was) in *Chan Chow Wang*¹ that is, the court must decide according to what is fair and reasonable. This means that the whole circumstances of the case must be considered.

B The word 'fair' must necessarily mean that the decision must be fair firstly to the members of the public with whom the applicant will be renewing professional relations once re-admitted because the law seems to protect not only the profession but also the public from errant lawyers.

C The decision must also be fair to the profession and to his colleagues in the profession. The appellant here produced several letters from senior members of the legal profession exhibited at pp 72-77. The Bar Council in its letter at p 79 of the appeal record stated that it would not object to the application. The Bar Council did not object to the application before the High Court and maintained the same stance in the appeal before this court. On 22 September 1989 in his report and statement of facts the President of the Malaysian Bar stated that the Council had no reason to doubt the appellant's declaration of remorse and repentance and had no reason to doubt the expressions of opinion as to the appellant's character and fitness for re-admission to the Roll.

D E F The word 'fair' also requires that the decision must be fair to the court itself because when re-admitted the appellant will be an officer of the court.

G Last but not least the decision must be fair to the appellant. True he was convicted under s 409 of the Penal Code and by all counts it is a serious offence especially to an advocate and solicitor. True the court must necessarily be disinclined to restore the name of an advocate and solicitor who had committed a misconduct and the onus of an applicant for admission under s 107 of the Act is a heavy one. But the duty of the court is to look at the circumstances and all the materials available to satisfy itself that an applicant has repented and reformed and there is a strong likelihood that he is not going to repeat the misconduct.

H I *Ex parte Lenehan*⁴ laid down a general principle that in a case of this nature the court must exercise its discretion in the light of all the circumstances of each particular case bearing in mind as pointed out by Rich J at p 426:

Solicitors are officers of the court and the public expects that the court will, so far as it can, ensure upright and honourable conduct on the part of its officers. The inter-

ests of the court, the public, the profession and of the applicant must be considered (cf *In re Kearney*) (1908) 8 SR (NSW) 87, at p 89.

A person in the position of the appellant is in a sense put in a more disadvantageous position than an ordinary applicant seeking for admission into the roll because in seeking for restoration to the roll he must satisfy the court not only that he is a fit and proper person to be restored but must displace the possible permanent unfitness which was the basis of his removal.

The court should not however forget that once removed from the roll it must not be construed that the door is shut forever to the lawyer. A conviction should not be regarded in every case as a permanent unfitness. Disbarment is not necessarily intended to be permanent but that a heavy burden lay upon an applicant to show that he is now a fit and proper person to have his name restored to the Roll. The lapse of time since the conviction is thus a material consideration. It is true that there should be strong disinclination to re-admit to the profession an advocate and solicitor who had been guilty of improper conduct. The principle that once a solicitor has been struck off the Roll for dishonesty he cannot be restored unless there are exceptional circumstances should no longer apply in absolute terms. If an advocate and solicitor lives a blameless life and there is evidence that he has rehabilitated himself generally and there are members of the profession who can vouch to this change, that may overcome the initial misconduct. As stated in *Ex parte FE Maddocks Cohen*.⁵

There must be a strong disinclination to admit to the profession of a solicitor any person who has been shown ever to have been guilty of improper conduct. It is a disinclination founded upon the safety of such a course and the need of strictness in maintaining the standards of the profession. But the false steps of youth and early manhood are not always final proof of defective character and unfitness. The presumption which, according to circumstances, they may appear to raise may surely be overcome by a subsequent blameless career.

There is no evidence that the appellant has committed any irregularity during the last 14 years. The lapse of 14 years from the date of the breach to the date of the application was a factor in favour of the appellant.

In *Ex parte Clyne*,⁶ Clyne was struck off the roll by order of the court dated 8 December 1959. Two years later he applied to be re-admitted. The court was not satisfied that he had undergone a whole-hearted change of attitude in that the court felt that insufficient time had elapsed since the applicant's disbarment to justify the court in re-admitting him.

The duty of the court in a case like this is to exercise its discretion having regard to the materials available before it and the particular facts of the case. The question should be seen as an exercise of discretion accord-

ing to particular facts of the case. It should never be regarded as a principle laid down as a rule of law that an advocate and solicitor who has been struck off the Roll for dishonesty can never be reinstated.

Section 107 of the Act requires that the decision should also be a reasonable decision. A reasonable decision is a decision which is based on reasonable grounds. A reasonable decision must first of all be supported by cogent evidence and not one based on conjecture or speculation.

In a report to the court under s 33(3) of the Bankruptcy Act 1967 on 25 May 1988 the Official Assignee certified that no offence under the Bankruptcy Act had been committed by the appellant. On 13 June 1988 the appellant obtained a discharge from bankruptcy. The High Court, however, when hearing the application by the appellant, called the Official Assignee as amicus curiae and enquired on the defaults by the appellant under s 38 of the Bankruptcy Act relating to the requirement to render to the Official Assignee an account of all moneys every six months. On the strength of the statement of the Official Assignee as amicus curiae, the High Court went behind the order of discharge and the report of the Official Assignee as stated earlier and drew unfavourable inferences against the appellant. To be reasonable a decision must be based on cogent evidence properly received and subject to cross-examination.

This was an appeal on the exercise of discretion based on what is fair and reasonable. It was an appeal largely on how the court should view and assess the relevant facts and circumstances of the case. The High Court had made up its own mind and gave its reasons in a written judgment. But that does not mean this court is precluded from re-examining the materials available to the court then. The principle to be applied is as stated in *Coghan v Cumberland*⁷ where in the judgment of the court (Lindley MR, Rigby and Collins LJ) the following appears:

Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong.

The burden of ensuring that the legal profession is safeguarded from errant members must be shared between the court also as guardian of public interest, the Bar Council and members of the profession themselves. In the application by the appellant the view of the Bar Council should be regarded as the collective view of the profession. The views expressed in the testimonials are the views of his peers. Although the opinion of the Bar

Council or the senior members of the profession as expressed in their testimonials should not in any way be substituted for the view of the court, if the Bar Council and members of the profession themselves feel that an applicant should be restored to the roll, and this view is not inconsistent with the other materials before the court the burden on the court is surely less onerous and much of the foundation for disinclination to entertain the application is gone.

In the final analysis the question here is simply whether on the materials available, it is fair and reasonable for the court to find that the appellant is a proper person to have his name restored to the Roll and it is not against the public interest to so order. Considering all the circumstances of the case it was certainly fair and reasonable to allow the appellant's name to be restored to the roll.

The judgment of the High Court was accordingly set aside and we ordered that the name of the appellant be restored to the roll. We however made no order as to costs.

At the conclusion of the hearing of the appeal counsel appearing for the Bar Council wanted clarification as to who should be served with the notice of motion under s 107 of the Act. The answer must be as what is found in s 103 and s 107 of the Act, that is, the notice of motion shall be served to the Bar Council who shall be represented at the hearing of the motion and who shall place before the court a report which shall include copies of any report of the proceeding as a result of which the name of the applicant was removed or struck off from the Roll. There is no requirement to serve the notice of motion on any other person.

Appeal dismissed.

Solicitors: *Christina Chia, Ng & Partners; Shearn Delamore & Co.*

Reported by *Prof Ahmad Ibrahim*

A Abdul Jalil bin Abdul Satar v Public Prosecutor

SUPREME COURT (KUALA LUMPUR) — CRIMINAL APPEAL
NO 49 OF 1987
ABDUL HAMID OMAR LP, HARUN HASHIM AND GUNN
CHIT TUAN SCJJ
14 MARCH 1991

B *Criminal Procedure — Witness — Failure to call giving rise to serious gap in prosecution case — Serious breach in chain of evidence relating to drugs produced in court*

In this case the appellant had been convicted on a charge of trafficking in dangerous drugs and sentenced to death. It appeared that a former police officer, Teh Kok Liang, had sent the exhibits in the case to the government chemist and that a witness received the exhibits from Teh Kok Liang together with the chemist's report. Teh Kok Liang was not called to give evidence as it was stated that he had retired and could not be traced. The exhibits could not be identified by the officer who picked them up at the scene.

D **Held**, allowing the appeal and setting aside the conviction and sentence:

The prosecution in this case had not given valid reasons as to why Teh Kok Liang could not be traced or what efforts had been made to trace him. The failure to call the witness has caused a serious break in the chain of evidence relating to the identity of the drugs produced in court. As the prosecution has failed to comply with the requirements of strict proof in a criminal case, the appeal must be allowed and the conviction and sentence set aside.

[Bahasa Malaysia summary]

Di dalam kes ini perayu telah disabitkan atas tuduhan mengedar dadah merbahaya dan telah di hukum mati. Barang kes telah diberi oleh seorang pegawai polis, Teh Kok Liang, kepada pegawai kimia dan kemudian seorang lain telah menerima barang kes itu dari Teh Kok Liang. Teh Kok Liang tidak dipanggil sebagai saksi oleh kerana dikatakan ia telah bersara dan tidak boleh dikesan. Barang-barang kes itu juga tidak boleh dikenali oleh pegawai polis yang mendapatnya di tempat kejadian itu.

G **Diputuskan**, membenarkan rayuan dan mengenyepikan sabitan dan hukuman:

Pihak pendakwa di dalam kes ini tidak dapat memberi sebab-sebab yang sah kenapa Teh Kok Liang tidak dapat dikesan atau dicari atau menerangkan langkah-langkah yang telah diambil untuk mencarinya. Kegagalan memanggil saksi itu telah menyebabkan talian keterangan diputuskan mengenai identiti dadah yang dibawa ke mahkamah. Oleh kerana pihak pendakwa telah gagal mematuhi kepada beban pembuktian yang ketat di dalam kes jenayah, rayuan hendaklah dibenarkan dan sabitan dan hukuman diketepikan.]

Cases referred to

- 1 *Teoh Hoe Chye v PP* [1987] 1 MLJ 220 (fold)
- 2 *Su Ah Ping v PP* [1980] 1 MLJ 75 (reft)

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Appeal from: Selangor Criminal Trial No 15/84 (High Court, Kuala Lumpur)

Harpal Singh Grewal (S Thayaparan with him) for the appellant.